Supreme Court U.S.
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No. 01-1759

IN THE

Supreme Court of the United States

MELITA PICCIOTTO
Petitioner,

v.

MITCHELL J. SIKORA, JR.,
As Associate Justice of the Superior Court
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court For The
Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

This petition for writ of certiorari appeals the final judgment of the Supreme Judicial Court of Massachusetts (SJC) dismissing the Petitioner's independent certiorari action. The Petitioner requested the SJC invoke their superintendent powers to control the conduct of the Respondent, so that she may receive some semblance of a fair trial. The record reflects, and it is uncontested, that pre-trial the Respondent conducted unconstitutional *ex parte* hearings, committed fraud on the court, and engaged in other behavior harmful to the effective administration of justice. The SJC refused to address the behavior of the Respondent, causing the Petitioner to endure a three-month long trial before the Respondent that was fundamentally defective *ab initio.*

1. Whether the Petitioner's constitutional rights were violated by the SJC's refusal to invoke their supervisory power to control the conduct of the Respondent.

2. Whether litigants have a constitutional right to self-representation in civil cases.

Parties to the Proceeding

All the parties to the proceeding in this Court are listed in the caption of this petition. Albert P. Zabin and Schneider, Reilly, Zabin & Costello, P.C. (SRZC) was listed on the SJC's order as interveners. Although they did seek to become interveners, they filed no briefs before the SJC and were not permitted to participate in the oral arguments before the court. They are not proper parties to this action and the Petitioner would object to their late entry. They have, however, been served.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Melita Picciotto respectfully petitions for a writ of certiorari to review the judgment of Supreme Judicial Court of the Commonwealth of Massachusetts (SJC) in this case.

OPINIONS BELOW

The opinion of the SJC was reported at 763 N.E.2d 53 (2002), (App. a). The opinion of the single justice of the SJC was not reported (App. d).

JURISDICTION

The judgment of the SJC was entered February 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a). The Petitioner appeals the decision of the SJC, which affirmed the judgment rendered by the single justice of the court dismissing the Petitioner's petition for writ of certiorari. The petition brought before the single justice constituted an independent action, brought because the trial court was not proceeding according to the essential requirements of constitutional law. The issues presented therein are completely separate from the merits of the case before the trial court. The SJC decision refusing to control the conduct of their trial court in order to ensure the Petitioner receive a fair trial

conclusively determined the question before it. Further, the decision is effectively unreviewable on appeal from final judgment. It is therefore within the jurisdiction of this Court to issue writ. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, (1949), *Firestone Tire & Rubber Co .v Risjord*, 449 U.S. 368 (1981).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are the Petition Clause of the First Amendment to the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment to the U.S Constitution. They have been reproduced at App. f.

STATEMENT OF THE CASE

The legal arguments presented to this Court were all duly brought to the SJC. The facts of this case are uncontested by the Respondent. The Petitioner filed a petition for writ of certiorari on May 11, 2001 before the single justice of the SJC, requesting that the court invoke its constitutional superintendence over Associate Justice of the Superior Court, Mitchell J. Sikora (Respondent). The Petitioner sought to enjoin the Respondent from ordering guards to grab the pro se

Petitioner[1], and eject her from hearings, and then continue with the scheduled hearings while issues that affected the Petitioner's vested property interests were debated in her absence, or in the alternative, divest the Respondent of his *de facto*[2] jurisdiction and allow another Superior Court Justice to retain jurisdiction over the proceedings. The Respondent admits he had the Petitioner removed on three separate occasions: October 13, 2000, March 2, 2001 and April 6, 2001. The Respondent then continued the hearings in the Petitioner's absence, over her objection. The record reflects that this occurred twice because the Petitioner asked opposing counsel, to stop interrupting her while she was arguing in defense of her cause, and once because the Petitioner

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1 The Petitioner was not simply a party before the Respondent but the sole representative of her property interest.

2 In Massachusetts the Superior Court has a circuit court system and the judges regularly rotate amongst the counties to insure that more than one judge reviews the merits of a case. In this case that did not occur.

3 The opposition was pressing a claim for substantial performance of a contingency fee agreement entitling them to 75% of the Petitioner's funds held by the court in an escrow account by the court. Additionally, they sought treble damages and attorneys fees against the Petitioner for not

informed the court that opposing counsel misrepresented a material fact in their pleadings.[3] On June 13, 2001 the Respondent issued an order finding that the Petitioner had been represented at all times both as a defendant and as a counter claimant by counsel, and that she had been acting in an unruly manner which warranted his treatment of her. Furthermore, despite her obvious desire to represent herself at trial, her behavior must necessarily preclude her from doing so. The Respondent attached this order to the opposition he prepared dated June 11, 2001, in response to the May 11, 2001 petition. The Respondent's position before the single justice of the SJC was that the Petitioner was not subjected to unconstitutional *ex parte* hearings because she was at all times represented by counsel. To the extent the Petitioner was aggrieved that as a party she was ejected from the courtroom, the issue was reviewable via the normal appellate process. The

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having immediately acquiesced to their 75% demand. The opposition demanded that the court retain all the Petitioner's settlement funds for the satisfaction of their claims. Yet the "agreement" they sought to have enforced did not exist. While these lawyers did have agreements with some of the Petitioner's co-defendants, they did not have any such agreement with her. When the Petitioner pointed this out, the Respondent had her removed and continued to entertain argument from the opposition in her absence. It bears mentioning that the Respondent has a personal relationship with one of the opposing parties and though he initially denied it, he has now admitted on the record to meeting with this party while sitting on this case.

single justice, upon receipt of Respondent's opposition, immediately dismissed the petition on the grounds that appellate review was eminently available to the Petitioner, therefore, certiorari could not, as a matter of law, issue. The Petitioner appealed the decision of the single justice to the full court of the SJC on the grounds that the Respondent had fraudulently represented that the Petitioner was represented by counsel those times when he ejected her and conducted hearings in her absence. She argued that she was being subjected to a tribunal that had repeatedly conducted unconstitutional *ex parte* hearings, and had issued an order to defend his conduct before the SJC, which deprived her of her constitutionally guaranteed right to represent herself. Worse still, the attorney that the Respondent was imposing on her on the eve of a three-month long trial was a material witness in the case whose testimony was slated to be (and was allowed to be) introduced by the opposition, leaving the Petitioner completely unable to cross-examine this key witness. Further, the Respondent required the Petitioner to pay the fees of this attorney ($250 per hour), a massive burden in the context of a three-month long trial. The Petitioner argued that normal appellate review could not protect the many substantive rights she had lost. It certainly could not alter the nature of her indebtedness. The Petitioner argued that these additional serious due process violations emanated from the Respondent's fraudulent representation to the

single justice, made in defense of his conduct, and they too should be addressed by the SJC. Further, she claimed it was now clear that the Respondent was unfit to be the trial judge in her case because she was entitled at bare minimum to a "fair trial before a fair tribunal." This requirement could not be satisfied where the Respondent had engaged in such conduct against her; a liar is by definition unfair. The Respondent did not refute that he had in fact committed fraud on the court. He could not. The record reflects absolutely unequivocally that the Petitioner was representing herself pro se in defense of her property. Another Superior Court Justice, Associate Justice Vieri Volterra, issued an order allowing counsel for the Petitioner to withdraw and allowing, specifically, the Petitioner to represent herself. The Petitioner always identified herself for the record as a pro se litigant and the record reflects the Respondent referring to her as a pro se litigant on multiple occasions. The Respondent instead argued that if the Petitioner was aggrieved by the order she should have appealed it via the normal appellate process. Additionally, he claimed that the pro se Petitioner was really attempting to seek additional appellate review of his refusal to recuse himself from her case and was simply using the wrong procedure. The SJC agreed that all the Petitioner's allegations were issues eminently reviewable

through the ordinary appellate process and refused to issue writ.[4]

REASONS FOR GRANTING THE WRIT

The Petitioner has been denied a triad of constitutional guarantees. She was denied the right to cross-examine a key witness by virtue of the fact she was required by the court to be represented by the witness. This right is essential to a fair trial. *Brunton v. United States*, 391 U.S. 123 (1968); *Chambers v. Mississippi*, 410 U.S. 284 (1973). The Petitioner additionally had the clear right not

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4 The SJC's order is vague and a little confusing. It references the fact that the Petitioner has complained of the conduct of the Respondent in other appeals and has previously sought to have him removed from her case. The Petitioner has appealed discovery orders, for example the Respondent's order that all the Petitioner's original evidence be turned over to custody and control of the opposition (one of whom, Edwin A. McCabe was barred from practicing law by the Federal Courts for document fraud and witness tampering. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120 (1989), *NASCO, Inc. v. Calcasieu Television & Radio*, Inc., 894 F. 2d 698 (1990), *Chamber v. NASCO, Inc.*, 111 S. Ct. 2123 (1991). Of note is that Massachusetts found nothing wrong with McCabe's conduct, *In the Matter of Edwin A. McCabe* 7 Mass. Attorney Discipline Reports 181 (1992). She also appealed the Respondent's decision to take *de facto* assignment of her case. So while it is true that the Petitioner has both sought the recusal of the Respondent and complained he had abused his discretion in discovery orders, the issues presented to this Court have not been the subject of any other appellate proceedings.

to be subjected to *ex parte* hearings before being deprived of property. She was denied the right to a fair tribunal. The Respondent irrefutably committed fraud on the court in the context of this action. Judges in Massachusetts have previously been removed from the bench for engaging in that sort of despicable conduct, and found unfit to preside over any trial. *In Re Troy,* 306 N.E. 2d 203 (1976), *In Re DeSaulnier,* 279 N.E. 2d 287 (1971). It is obvious that the Respondent was unfit to preside over the Petitioner's trial. The Supreme Judicial Court of Massachusetts has "... the inherent power to do whatever may be done to insure the citizen a fair trial, whenever his life, liberty, property, or character is at stake. The possession of such power involves its exercise as a duty whenever public or private interest requires." *Crocker v. Justices of the Superior Court,* 208, Mass. 162, 179 (1911). The Supreme Judicial Court has the inherent constitutional power of general superintendence over all courts of inferior jurisdiction to correct and prevent abuses if no other effective remedy is provided. *Elder v. Commonwealth,* 385 Mass. 128 (1982). The flagrant, intentional, constitutional violations and outright immoral conduct on the part of the Respondent as a sitting trial judge is intolerable. Fraud on the court victimizes not only the individual litigant but by compromising its integrity victimizes the court system itself. "The very temple of justice [is] defiled." *Universal Oil Products v. Root Refining Co.,* 328 U.S. 575, 580 (1946). The SJC's silence

condones the conduct of the Respondent, which necessarily brings the administration of justice in Massachusetts into disrepute. The SJC clearly had the jurisdiction and duty to issue writ. They chose instead to abdicate the responsibility they have to both the Petitioner as well as the public. The SJC's decision refusing to invoke their supervisory powers to control the conduct of Respondent resulted in a three-month long jury trial before him that was facially as well a factually an utter miscarriage of justice. The State of Massachusetts is currently in the midst of a financial crisis that is so drastic that many civil trials are being postponed indefinitely. The Chief Administrative Judge of the Trial Court has reported that the doors to the trial courts in Massachusetts may soon close to both civil and criminal litigants because of massive funding cuts. The ruling of the SJC did not affect simply the substantive rights of the Petitioner, but by draining the precious resources of the trial court (over 50 thousand dollars was spent on the jurors alone), it has, in practical terms, abridged the rights of litigants across the state.

The Petitioner and the citizens of the Commonwealth deserve a state court system that at least minimally meets its constitutional obligations. This case evidences that the Supreme Judicial Court has been alarmingly derelict in their duty. That is, one would hope, reason enough for this Court to issue writ.

However, the Petitioner comes to this Court not simply because she has been deprived of these basic well established constitutional guarantees by the Massachusetts court system itself, but because she, like countless others across the nation, has been deprived of a natural right that the plain language of the constitution zealously protects, yet the courts of this country, state[5] and federal, have consistently refused to even acknowledge: the constitutional right of the citizens of the United States to represent themselves in civil actions. *O'Reilly v. New York Times Co.*, 692 F.2d 863 (2nd Cir. 1982); *Andrews v. Bette Power Corp.*, 780 F.2d 124 (1st Cir. 1985); *Devine v. Indian River County School*, 121 F.3d 576 (11th Cir. 1997). Civil litigants are allowed to represent themselves in Massachusetts (and most states) as well as in the Federal Courts pursuant to statute M.G.L. c. 221 § 48 and 28 U.S.C.A. § 1654. However, no prejudice is assumed by the denial of this right. When a civil litigant is denied that right to represent themselves at trial they face the nearly insurmountable burden on appeal of proving they would have done better if they had been allowed to represent themselves.

The First Amendment to the U.S Constitution of the United States guarantees its citizens the right to petition the government for redress. The judiciary, no less than its governmental

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[5] It should be noted that some state constitutions do expressly confer the right of self-representation to civil litigants.

coordinates, is bound by the constitution, including this amendment. *Bursey v. US,* 466 F2d 1059 (1972).

The petition clause clearly protects access to both state and federal courts. *California Motor Transportation Co. v. Trucking Unlimited,* 404 U.S. 508, 520 (1972); see also *NAACP v. Button,* 371 U.S. 415 (1963). In a triparte system of government, any meaningful right of petition must extend to the judiciary. The judicial system serves as an important forum for the expression of political and social dissatisfaction. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights. *NAACP v. Button,* 371 U.S. 415 (1963). That is not to say that the litigation must resolve issues of massive social importance, in order to be worthy of First Amendment protection. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, ...are not solely religious or political ones." *Thomas v. Collins,* 323 U.S. 416 (1945). The constitutional rights embodied in the First Amendment are intimately connected in purpose, and while not identical, are inseparable. *United Mine Workers of Americda Dist. 12 v. Illinois State Bar Ass'n,* 389 U.S 217 (1969). Thus, the advocacy and speech associated with litigation clearly enjoy the full protection of the First Amendment. First Amendment rights are ones "...that the Court has come to regard as fundamental and that demand

the lofty requirement of a compelling governmental interest before they may be significantly regulated." *United States v. Kras,* 93 S. Ct. 631 (1973).

The Supreme Court found in *Ferreta v. California,* 422 U.S. 806 (1975) that a criminal defendant has the right to represent his or herself pro se. In the *Ferreta* case the court discussed in detail its' rational which included statements made by Tomas Paine on the Bill of Rights 1777. The "right to plead {one's} own cause," Paine said, is a "natural right," the "right of pleading by proxy, that is by counsel," is a "civil right," an "appendage" to the natural right, which supplements rather than supplants it. The current position of our courts, that the U.S. Constitution only protects the right of civil litigants to petition the judiciary when they act through proxy represents a drastic, unconstitutional abridgement of civil litigants' First Amendment rights that demands this Court's attention.[6] The constitutional right of the citizens to petition the government for redress of grievances is reduced to an empty verbalism if that right is, in reality, conferred only to a fraction of the populous and the majority of citizens are barred from petitioning

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[6] The recognition of a pro se litigant's First Amendment right of access to the judicial system need not, and should not, have any impact on the applicability of the rules of court. The rules of court in this context are analogous to rules applicable to legislative petitions.

on their own behalf. "...unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." *Ferreta v. California,* 422 U.S. 806, 821 (1975). It is utterly inconceivable that this tenuous legal fiction is constitutionally acceptable in connection with civil litigants protecting their property or other interests.

The *Ferreta* Court determined that the right of self-representation for criminal defendants is implicitly granted by the Sixth Amendment. The Petitioner believes it would have been more accurate, given their explanation of the nature of the right, for the Court to have concluded that the right of self-representation is protected by the First Amendment as well the Due Process Clause, unabridged by the Sixth Amendment. Concurring in the Judgment of the Court, which recently upheld *Ferreta,* Justice Scalia stated, "While I might have rested my decision upon the Due Process Clause rather than the Sixth Amendment, I believe it was correct." *Salvador Martinez v. Court of Appeals California 4th Appellate District,* 528 U.S.152, 165 (2002). The right to defend one's life, liberty, or property by oneself, is among those fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions. The option to exercise that right is clearly essential to a fair trial.

CONCLUSION

Justice Blackmun, in his dissenting opinion, chastised the *Feretta* Court for bestowing the constitutional right on one to make a fool of himself. The founders did not believe that the choice to represent oneself was inherently foolish and protected that individual choice with the full force of the constitution. Inarguably, it is an inherently foolish government that does not recognize the natural right of its people to have their voices heard in the arena they have expressly created for the peaceful, lawful, adjudication of their grievances. "The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio Ry.*, 207 U.S. 142, 184 (1907). The First Amendment and the Due Process Clause, operating together, firmly anchor the right of civil litigants to represent themselves in a specific constitutional safeguard that places a heavy burden of justification upon any government restriction.

Respectfully Submitted.

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJC-08608

MELITA PICCIOTTO

VS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT & OTHERS[1]

February 25, 2002

The petitioner filed a petition seeking relief in the nature of certiorari in the Supreme Judicial Court for Suffolk County. G.L. c. 249 § 4. She sought an order (1) compelling the recusal of a Superior Court Judge; (2) directing another Superior Court judge to review and modify the first judge's orders; (3) permitting her to represent herself; and (4) compelling the first judge to "respect and enforce" the applicable law. A single justice of this court denied the petition, and this appeal followed.

In substance, the petitioner contends that the Superior Court judge should be removed or recused

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[1] Albert P. Zabin and Schneider, Reilly, Zabin & Costello, P.C. interveners.

from continuing as a judge in the underlying case because his alleged conduct in the case, including. ejecting her from the court room and continuing hearings without her, and his purported relationship with opposing counsel. She also argues that she should be permitted to represent herself both at trial and otherwise, and that proceedings may not be conducted without her participation. Although the petitioner acknowledges that many of the issues raised in her petition also have been raised "piecemeal" in filings pursuant to G. L. c. 231 § 118, or G.L. c. 211§ 3 and that in neither case, did the court find any matter warranting relief, she urges that in aggregate, "injustice is apparent."[2]

We do not address the merits of the petitioner's claims. Those general claims have twice before been the subject of unsuccessful petitions in this court and the Appeals Court; other claims that she now raises, though reviewable under G.L. c. 231 § 118, have not been pursued. Certiorari simply does not provide an additional or alternative avenue of appellate review. See *Genninger v. Commissioner of Correction*, 419 Mass. 1009 (1995). Indeed, the purpose of a civil action in the nature of certiorari is to correct errors that "are

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[2] Additionally, the petitioner argues that the judge's ejection of her from the courtroom did not "generate orders," and, accordingly, that "injustice" is remediable only through certiorari. That argument is without merit. See *Commonwealth v. Chubbuck*, 384 Mass. 746, 751 (1981). A judge's removal of a party from the courtroom is a matter of discretion, which is generally remediable on appeal. *Commonwealth v. Senati*, 3 Mass. App. Ct. 304, 308 (1975).

not otherwise reviewable by motion or by appeal." G. L. 249 § 4. The Petitioner's allegations involve matters eminently reviewable through the ordinary appellate process. See *Doten v. Plymouth Div. Of the Probate & Family Court Dep't,* 395 Mass. 1001 (1985) (recusal); *Commonwealth v. Chubbuck,* 384 Mass. 746, 751 (1981) (removal from a court room); *Curtis v. J.J. Duffy Adjustment Serv., Inc.,* 31 Mass. App. Ct. 949 (1991) (self-representation by civil litigants).

Accordingly we find no clear error of law or abuse of discretion," *Mack v. Clerk of the Appeals Court,* 427 Mass. 1011, 1012 (1998), in the single justice's denial of petition.

Judgment affirmed

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2001-0221

MELITA PICCIOTTO

VS.

MITCHEL J. SIKORA, JR., as
Associate Justice of the Superior Court

MEMORANDUM AND ORDER AND JUDGMENT

The petitioner has filed a petition for certiorari, pursuant to G.L. c. 249, § 4, in which she seeks an order that the respondent, an associate justice of the Superior Court, be recused from any further participation in a civil action, *Zabin, et. als vs. Picciotto, et als,* Suffolk County Superior Court, docket number 99-1594. Trial in that action is scheduled to commence on Tuesday, June 19, 2001, and is estimated to last two months.

Certiorari is a form of judicial review available when no other avenue for review is provided. See *Town of Reading v. Attorney General,* 362 Mass. 266, 269 (1972. The matters raised in the petition may be reviewed in a direct appeal, and therefore relief in the nature of certiorari does not lie. Moreover, to the

extent the petitioner seeks the recusal of the trial judge, she has not followed the proper procedure. A party seeking the recusal of a judge generally must, in the first instance, present a motion for recusal to that judge, serving all other parties. The judge's decision on the motion is reviewable under the standard of abuse of discretion, See *Demoulas v. Demoulas SuperMarkets, Inc.*, 428 Mass. 543, 546 (1998). That was not done in this case.

The petition for certiorari is denied.

By the Court,

"s/_____".

Entered: June 15, 2001

AMENDMENT [I]

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

AMENDMENT [XIV]

Citizenship rights not to be abridged by the states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State where in they reside. No State shall make or enforce any law, which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.